United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7352

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

No. 75 - 7352

Le ROY F. GILLEAD, et al,
Appellants,

v.

DEFENSE SUPPLY AGENCY, et al,
Appellees.

B

P/S

Appeal From The United States District Court
For The Southern District of New York

BRIEF

Le ROY F. GILLEAD
Appellant Pro se, et al.
1236 Burke Avenue
Bronx, New York 10469

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Dated: August 25, 1975

TABLE OF CONTENTS

TABLE OF AUTHORITIES

* See Appendix

STATEMENT OF ISSUES

1. It is error and against public interest to dismiss on mootness,(i.e., federal employee's, plaintiff's, resignation, characterized by him as constructive termination from the federal agency, defendant No. 1) this complaint and plaintiffs' motion for the relation back amendment under Rule 15(c) Rules of Civil Procedure for the United States District Courts, and a denial of due process and equal protection of the laws, to deny a federal employee opportunity with his judicially cognizable claims in his statutory judicial review under 5 USC 702, to protect his integrity, life, liberty and property, as well as the equal employment opportunity (EEO) rights of fellow Americans and other beneficiaries of the classes under Executive Order (EO) 11246, as amended, hereinafter called the Order, whom the plaintiff federal employee was specifically employed to protect, not to deny protection of the EEO rights of these beneficiaries and to clear plaintiff's permanent federal employee record (DSA Form 46) from unfair and inaccurate rating (Oct 31, '71) and performance appraisals (Oct 31, '71, '72)* unlawfully and maliciously constructed by agency officials (Defs. 3,4,5) and supervisors (Defs. 6,7) in that their actions were not in accordance with applicable regulations of the United States Civil Service Commission Federal Personnel Manuel or of the defendant Agency (Def. 1), and their rating (Oct 31, '71) of plaintiff and appraisals (Oct 31, '71,'72) were not supportive of the Agency's required official records of the employee's actual performance, but was fabricated, and that the Agency's alleged discretionary actions thereafter and its decisions in the seven (7) related grievances initiated by the employee plaintiff against the Agency, officials and supervisors (defs. 1-7) for statutory review, 5 USC 702, were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (5 USC 706(2)(A)), and the unlawfull actions were for the purpose of covering-up their unlawful violations with contempt and malice aforethought for the letter, spirit and intent of the conditions and terms of employment for federal employees, the Civil Rights Act

of 1964, as amended by The Equal Employment Opportunity Act of 1972, EO 11246 (30 FR 12319) as amended by EO 11375 (32 FR 14303) and the Secretary of Labor implementing rules and regulations promulgated thereunder in Title 41 of the Code of Federal Regulations, Part 60 (41 CFR 60-1.44, 60-2.2(b),(c)) which federal employees, plaintiff and his former and current colleagues, federal agencies and federal contractors are obligated to follow to protect the EEO rights of the classes of beneficiaries under the Order as amended.

2. Conversely, the issues presented for review do not relate in any way to defendant federal Agency's reasonable or discretionary procedures or "...that the Agency was being remiss in its contract compliance responsibilities" (last sentence first paragraph Memorandum Opinion) under the Order, as was seen by the writer and/or the signer of the Opinion, but the issues relate in the first instance to defendant federal Agency's unlawful actions in violation of its obligations under the Order and the Agency's subsequent and apparent lawful actions thereafter on the employee's permanent record of rating and appraisals and the Agency's final determinations of the employee's, plaintiff's seven(7) grievances, to justify and to cover-up defendant Agency's unlawful violations of its obligations under the Order in the first instance.

NATURE OF THE CASE

3. This appeal is of a judicial review of seven (7) related and exhausted administrative remedies under 5 USC 702. While not previously requested or specified, the nature of this case involves equity and law.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

4. Complaint was filed and amended as a class action and answer was to the amended complaint. Defendants moved the Court below for "...an order dismissing the entire complaint as moot, or in the alternative dismissing the class action allegations of the complaint...." Plaintiffs affidavit in opposition requested the Court below to, "...enter an order denying defendants motion...and to enter an order granting leave to plaintiffs under Rule 15(c) Rules of Civil Procedure for the United States District Courts for the relation back amendment to include the two (2) additional grievances /initiated before this complaint but not then exhausted/ and to specify the damages and remedies as a result of the 'constructive termination' and such other relief as is just."

5. In the Memorandum Opinion* of the Court below it states that, "The governments motion to dismiss the class action allegations is herby granted" and "In light of plaintiff's resignation -- and assuming that the complaint presents judically cognizable claims -- the dispute is now moot and the complaint is therefore dismissed."*

* See Appendix

STATEMENT OF FACTS

Defendants unlawfulness as mentioned in the Complaint, Affidavit in Opposition to Motion to Dismiss and Court's Memorandum Opinion.

6. In the continuing efforts of Presidents of the United States in the public interest to provide by Executive Orders for the promotion and insurance of equal employment opportunity in Government contracts, President Johnson on September 24, 1965 issued EO 11246 and on October 13, 1967 amended it by EO 11375 declaring, "It is the policy of the United States Government to provide equal opportunity in Federal employment and in employment by Federal contractors on the basis of merit and without discrimination because of race, color, religion, sex or national origin."

7. Section 201 of the Order states that, "The Secretary of Labor shall be responsible for the administration of Part II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof."

8. Section 205 of the Order states that, "Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations and orders of the Secretary of Labor issued pursuant to this order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint a designee, from among the agency's personnel, compliance officers. It shall be the duty of the officers to seek compliance with the objectives

of this Order by conference, conciliation, mediation or persuasion."

9. To discharge his responsibilities under the Order the Secretary established the Office of Federal Contract Compliance (OFCC) and delegated to its Director, functions and duties of the Secretary under Part II and Part III of the Order, except authority to promulgate rules and regulations of a general nature. (See sec. 401 of the Order and 41 CFR 60-1.3(i).)

10. The Secretary's orders, rules and regulations (41 CFR 60-1.3(t)) are under Chapter 60 of Title 41 of the Code of Federal Regulations. Order No. 1 (original date unknown), Designation of Compliance Agencies and Assignment of SIC codes, Obligations of Contractors and Subcontractors, May 21, 1968, and Order No.4 41 CFR 60-1,/Affirmative Action Programs, January 30, 1970, 41 CFR 60-2, are relevant for this appeal. Revised Order No. 4, December 1, 1971, and its amendments are not relevant for this appeal.

11. To reduce the administrative burden of monitoring all the federal agencies (41 CFR 60-1.3(b)), well over 100 since each is a contracting agency, Order No. 1, as revised from time to time with additions and deletions, assigned approximately fifteen (15) contracting agencies (41 CFR 60-1.3(g)) as compliance agencies (41 CFR 60-1.3(d)) to monitor the nonconstruction contractors assigned to them by the Standard Industrial Classification (SIC) code, irrespective of who is the contracting agency. Approximately thirty (30) SIC codes have been assigned to defendant (DOD/DSA) the largest contracting and compliance agency.

12. Under 41 CFR 60-1.6 "Duties of Agencies. (c) Agency regulations. The head of each agency shall prescribe regulations for the administration of the Order and the regulations in this part. Agency regulations, directives and orders for such purpose must be submitted to the Director prior to issuance and may be

enforced upon approval of the Director or 60 days after submission if not disapproved by the Director."

13. Further, under 41 CFR 60-1.44"Rulings and interpretations. Rulings under or interpretations of the Order or the regulations contained in this part shall be made by the Secretary or his designee."

14. Under 41 CFR 60-1.40"Affirmative Action compliance programs. (a) Requirements of programs. Each agency or applicant shall require each prime contractor who has 50 or more employees and a contract of $50 000 or more and each prime contractor and subcontractor shall require each subcontractor who has 50 or more employees and a subcontract of $50 000 or more to develop a written affirmative action compliance program for each of its establishments."

15. According to "Order No. 4" (41 CFR 60-2) in amplifying the provisions of 41 CFR 60-1.40, Affirmative Action Compliance Programs,"e review of agency compliance surveys indicates that many contractors do not have affirmative action programs on file at the time an establishment is visited by a compliance investigator. This part details the agency review procedure and the results of a contractor's failure to develop and maintain an affirmative action program and then set forth detailed guidelines to be used by contractors and Government agencies in developing and judging these programs as well as the good faith effort required to transform the programs from paper commitments to equal employment opportunity."

16. Under 41 CFR 60-2.2 "Agency action. (a) Any contractor required by 60-1.40 to develop an affirmative action program at each of his establishments who has not complied fully with that section is not in compliance with Executive Order 11246, as amended (30 FR 12319). Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in

60-2.10 through 60-2.31, the contractor is unable to comply with the equal employment opportunity clause..." of section 202 of the Order.

17. In respect to awarding contracts, "If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within the agency or through the Office of Federal Contract Compliance or other Government agencies, that the contractor has not developed an acceptable affirmative action program at each of his establishments, the contracting officer shall declare the contractor-bidder nonresponsible unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations...." (41 CFR 60-2.2(b)

18. Further, "Immediately upon finding that a contractor has no affirmative action program or that his program is not acceptable the contracting officer shall notify officials of the appropriate compliance agency and the Office of Federal Contract Compliance of such fact. The compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(b) of Executive Order 11246, as amended, should not be instituted." (41 CFR 60-2.2(c)

19. It came to the attention of the Director, OFCC, that 41 CFR 60-2.2(b), (para. 17, above), as well as other provisions of Order No. 4 (41 CFR 60-2) were not being enforced by compliance agencies, e.g., DOD/DSA (Def. 1). This caused the Director to issue a series of Questions and Answers on Order No. 4 to the compliance agencies for them to follow as required by section 205 of the Order.

20. Question 13* reads, "Can a contracting officer find a contractor responsible if he learns that one or more of the contractor's establishments or divisions has failed to develop acceptable affirmative action programs?"

21. Answer 13* reads, "No, even though the particular establishment or division where the contract is to be performed has an acceptable affirmative action program, the fact that one or more of the contractor's other establishments has failed to develop acceptable programs will render the contractor nonresponsible. Sec. 41 CFR 60-2.2(b)." (Para. 17, above)

22. On April 20, 1971, by memorandum,* defendant No. 2, Chief of the agency's, defendant No. 1, Contract Compliance Office (CCO), caused the Director's (OFCC) "Questions and Answers on Order No. 4" to be distributed to the Commanders of the eleven (11) Defense Contract Administration Services Regions, Defense Supply Agency (DSA), United States Department of Defense (DOD). The memorandum reads, "Forwarded for information and guidence is the enclosed series of questions and answers on Order No. 4 which has been prepared by the Office of Federal Contract Compliance (OFCC) for use by compliance agency personnel."

23. In turn, April 20, 1971, by inter-office memorandum* for the Commander of the New York Region (Def. 3), the Deputy Chief (Def. 7) of the Region's Contracts Compliance Office stated to the "CCO Professional Staff,...You will be guided by this statement."

24. Under all of the above, in conducting an $8 000 000 dollar compliance preaward review of a GSA (General Service Administration) prime contractor, plaintiff recommended the contractor in noncompliance because for well over 120 days the contractor-bidder failed to develop a written affirmative action compliance program for each of his establishments. (41 CFR 60-2.1)

(Chief of the Region CCO) (Deputy Chief of the Region CCO)
25. Defendant No. 6,/in front of Defendant No. 7,/on May 10, 1971, ordered plaintiff to change his recommendation of the contractor's compliance status, item 5. of plai ntiff's signed, item 11, hand written report, from noncompliance to compliance so the contractor could be awarded the $8 000 000 contract. Plaintiff refused. Defendant No. 6 (by the hand written notes on the original report of plaintiff) changed the status from noncompliance to compliance, expurgated the original report, had it typed with plaintiff's name in item 11 as reviewer and submitted the altered report to plaintiff through the office secretary for plaintiff to sign. Plaintiff refused. Defendnat No. 6 signed the altered report in item 12, as the Approving Official and contractor was awarded the $8 000 000 contract.

the professional
26. At the October 8, 1971 staff meeting conducted by defendant No. 6,/staff, including plaintiff, inquired as to the status of implementing 41 CFR 60-2.2(b) (para. 17, above) in accordance with the Director's quidelines (paras. 20,21, above) as approved by the Agency's (Def. 1) National Office (Para.22, above)

27. As a result of the inquires defendant No. 6 issued to the CCO Professional Staff an inter-office memorandum October 14, 1971, subject:"Status of AAP's at Contractor Facilities Not Reviewed On-Site"

28. The October 14, 1971 IOM interprets 41 CFR 60-2.2(b) and gives guilelines for the staff to follow in recommending the compliance status where a contractor's establishment/facilities, other than the location under on-site review does not have an AAP or does not have an acceptable AAP for each of his establishments/ facilities.

29. The October 14, 1971 IOM by defendant No. 6 appeared to be inconsistent with the guidelines of both the Director's and the Agency's for implementing 41 CFR 60-2.2(b).

30. In light of all the above plaintiff by memorandum October 18, 1971* requested the Department of Defense Deputy Compliance Officer, the Director of the Defense Supply Agency for "... agency wide reaffirmation...for contract compliance trainers, investigators and offices in their determination of the compliance status to be recommended by them inturn to contracting officers for contractors and contractor-bidders who have not developed ' a written affirmative action compliance program for each of its establishments..." No reply has ever been made.

31. On October 18, 1971, plaintiff submitted his hand written signed report for a preaward compliance review for the award of over $1 000 000, recommending the contractor in noncompliance for failing to develop a written affirmative action compliance program for two additional facility locations/on-site review by plaintiff and his assigned colleagues by defendant No. 6.

32. Defendant No. 6, in front of defendant No. 7, ordered plaintiff to change his recommendation of the contractor's compliance status from noncompliance to compliance in light of defendant's (No. 6) October 14, 1971 IOM to the CCO Professional Staff. Plaintiff refused since the IOM was not applicable to this review. Defendant No. 6 changed the status from noncompliance to compliance, signed plaintiff's handwritten report citing the IOM of October 14, 1971, and the contractor was awarded the contract of over $1 000 000.

33. Considering all of the above facts and circumstances, defendant No. 6, on the Employee Performance Appraisal and Rating (DSA Form 46) for the period November 1, 1970 to October 31, 1971*, rated plaintiff in item 8 of the Form, Satisfactory and in item 7 Supervisors Evaluation of Performance wrote, "Mr. Gillead's performance during the rating year was acceptable under current standards.

"He demonstrated great dedication to the contracts compliance program and its objectives. A need for improvement exists in the area of willingness to accept direction from his superiors on the interpretation of contracts compliance regulations. Mr. Gillead tends to resist interpretations which are at variance with his own understanding of the meaning of higher level regulations, such as those issued by the Office of Federal Contract Compliance, which is an agency of the Department of Labor. This problem requires attention by Mr. Gillead in order for him to continue to be effective in carrying the DOD contracts compliance program."

34. Item 14, What is being done to improve performance reads, "A training session in the new regulation covering employment tests and selection procedures is planned during the coming year, and Mr. Gillead will be scheduled to attend in order to improve his skills in this area."

35. For continuity in evaluation though not chronological as to the facts, a year later for the period November 1, 1971 to October 31, 1972*, the rating was still Satisfactory and the revised evaluation reads, " Mr. Gillead has been making some innovative approaches to workforce analysis as required by contractors. In some instances, this has been helpful, There has been improvement in his understanding of DCRN-V [NY CCO] procedures so that his recommendations are in line with those of DCRN-V and DCAS-V [Hdqs. CCO]"

36. In item 14, What is being done to improve performance, reads, " A 3 day training session sponsored by DCAS-V was made available to Mr. Gillead which he attended on 3,4, and 5 October [as required of all the professional staff] Mr. Gillead will be further counciled in analysis of the personnel policies and practices of contractors."

37. Both of these ratings and evaluations were signed under protest by the plaintiff in item 9. The supervisor's signature in the first was that of defendant No. 6 and in the second defendant No. 7. Defendant No. 5 signed both in item 11A as the Reviewing Official, assuring fairness and accuracy as required.

38. In protest no comments were made by plaintiff on the first appraisal. The written comment on the second appraisal reads, " In this evaluation item 7 the Reviewing Official has failed to assure the accuracy and fairness of my performance consistent with fact substantiated on the record. That is, that I at any time submitted ER/PER /Evaluation Report/Progress Evaluation Report/ recommending contractor's for non compliance not subject to our jurisdiction according to the supervisor. Therefore, the signature above is under protest to item 7 and the informal grievance procedure has been initiated. It should be noted no instances were given where innovative approches to work force analysis was not helpful."

39. On November 10, 1971, the Director, OFCC, by Memorandum 4200* wrote to the Director, Equal Opportunity (Civilian), DOD for the the Contract Compliance Officer, DOD, the Assistant Secretary of Defense for Manpower and Reserve Affairs, Office of the Secretary of Defense, stating that, "It has come to the attention of the OFCC that DCRN-V issued the subject memorandum dated October 14, 1971. This memorandum is inconsistent with the spirit and intent of Executive Order No. 11,246 and 41 CFR 60-2. (Order No. 4) You are hereby requested to order the subject memorandum rescinded immediately and to issue a clarification statement to all regions that is consistent with the position set forth herein with regard to compliance with Title 41, Sections 60-1.40 and 60-2.2(a) and (b) of the Code of Federal Regulations." The memo was never rescinded.

40. In fact, by memorandum November 11, 1971*, the Deputy Compliance Officer for DoD, the Director of DSA, defendant No. 1, reaffirmed the "inconsistent" memorandum of October 14, 1971 by defendant No. 6.

ADMINISTRATIVE REMEDIES

41. In addition to the grievance mentioned in para. 30 above and Complaint para. 34, four (4) other related grievances were initiated by plaintiff between the two annual (See paras. 35-48 of the Complaint) 1971 and 1972, Employee Performance Appraisal and Rating.

42. The additional grievances were as follows:

November 15, 1971 - Inspector General Complaint alleging non, mis and or mal feasance by DCRN-V in the discharge of the contracts compliance program citing among other cases the two (2) in paras. 24-25 and 31-32 above; See Complaint para. 38)

December [illegible] 1971 - Performance Rating Appeal for an outstanding rating since plaintiff, according to testimony by defendant No. 6, with support by defendant No. 7, was the only one of fifteen (15) GS-13 EOS's not following the IOM of October 14, 1971 by defendant No. 6; (See Complaint para. 37)

January 3, 1972 - Complaint of Discrimination in the Federal Government by defendant No. 6 for using plaintiff and his colleagues through economic duress, e.g., Employee Appraisal and Rating, assignments, career development, etc., to unlawfully deny protection of the EEO rights of the beneficiaries under the Order; (See Complaint para. 39)

January 31, 1972 - Informal Grievance Procedure to have defendant No. 6 answer questions for a good faith resolution of his allegations in a Letter of Warning to plaintiff dated January 5, 1972. (See Complaint para. 45)

43. All five (5) grievances were resolved against plaintiff by defendants Nos. 1, 3, 5 and by the Civil Service Commission in the Performance Rating Appeal and the Complaint of Discrimination.

44. As can be noted in the revised evaluation (para. 35-36 above) of the plaintiff for the period ending October 31, 1972, defendant No.7, in agreement with defendant No. 6, linked the October 31, 1972appraisal to the appraisal of October 31, 1971 by defendant No. 6.

45. Further, all of the original appraisals of the professional staff for the period ending October 31, 1972 had to be withdrawn for inaccuracies, fabrications and unfairness. In plaintiff's case, the revised appraisal is still fabricated, unfair and inaccurate. This fabrication, with approval by the reviewing official, defendant No. 5, was used by defendants 5 and 7 to deevaluate plaintiff on his application, December 1972, for promotional opportunity to Deputy Chief of the Office.

46. In grading the applicants on a scale of 100,55 points are objective and determined by a Committee and the remainding 45 are for the supervisor's evaluation, defendant No. 7, which is reviewed by defendant No. 5, as the Reviewing Official to insure objectivity as possible and consistency with the facts and evidence in actual performance as portrayed on an accurate fair official performance appraisal.

47. Of six (6) applicants, including plaintiff, incur office, defendant No.7 gave at least 41 of his 45 points to five (5) applicants excluding plaintiff. Plaintiff received 32 points for an over all score of 79, as compared with the 96 to 100 of his colleagues all of whom would have rated plaintiff higher than 41 of the 45 points.

48. Plaintiff's five(5) colleagues were the best qualified candidates and were therefore interviewed by a committee which included defendants 5 and 7. Two of the interviewees received outstanding ratings, one twice by defendants 6 and 7. The interviewee with a score of 100 had not received an outstanding rating. The candidate selected by defendant No. 7 with the approval of defendant No. 3 was the interviewee with the lowest score and the least experience in the contracts compliance program. None of the unsuccessful candidates appealed the appointment.

49. In light of the lack of the required assurance by defendant No. 5, as Reviewing Official that defendantNo. 7's appraisal of plaintiff for the period ending October 31, 1972 was fair and accurate and that the supervisor's, defendnat No. 7, evaluation of plaintiff for the promotional opportunity was consistent with applicable regulations, facts and evidence in plaintiff's actual performance, plaintiff on March 22, 1973, commenced the grievance procedure with defendant No. 4 for both of the grievances against defendant No. 5.

50. As is evident, these two (2) grievances were started before this complaint was filed, April 12, 1973, and they are an integral part of plaintiff's case with direct continuity and relatedness to the earlier five (5) grievances. Thus the relation back amendment.

51. The above seven (7) grievances and other events, e.g., assignments, career development, the agency hearing by an outside examiner of the last two grievances, made it clear to plaintiff that his employment and career in the Federal Government under these unlawful conditions were being irreparably damaged and instead of waiting and risking termination by whatever means in the future, plaintiff resigned September 29, 1973.

52. Item 30 Remarks, Standard Form 50*, Notification of Personnel Action, dated October 4, 1973, for plaintiff's resignation reads, "Employee Reason: In accepting my position as Contractor Relations Specialist, GS-13, Jan. '69, I was committed, without reservation, to the Agency's contracts compliance mission. To implement the applicable Orders, Rules and Regulations in good faith was my commitment. For the greater portion of my service, I have been frustrated by the Region from properly discharging my contracts compliance responsibilities. The intent and spirit of the provisions of EO 11246, as amended, and the applicable Rules and Regulations promulgated by OFCC and DSA, have been consistently thwarted by this Region. This apparent and continuing hopeless situation dictates that I resign or if applicable retire.

53. "Agency Reason: This office is not deviating from the mission assigned. There is consistent support for our program by the Region Commander and his staff. Records indicate the success of our program and this only comes from the devotion and hard work of our staff. It has been ascertained that the reason for the current resignation is to enable Mr. Gillead to enter another field of endeavor. Employee had filed a grievance alleging improper performance appraisal and improper promotion evaluation several weeks prior to resignation."

54. On October 12, 1973, in the letter* of defendant No. 1 to plaintiff in the last sentence reads, "Since you are no longer an employee of this agency the grievance is cancelled and no further action will be taken in this matter."

55. It should be noted that the agency's disregard for the EEO program as evidenced by the facts in this case are further documented documented for three (3) other Regions of the agency, i.e., Chicago, Philadelphia and SanFrancisco, in the May 5, 1975 report* of the Subcommittee on Fiscal Policy of the Joint Economic Committee Congress of the United States by the General Accounting Office and entitled The Equal Employment Opportunity Program For Federal Nonconstruction Contractors Can Be Improved.

56. Finally, none of the agency's investigations have found plaintiff's facts to be incorrect.

* See Appendix

ARGUMENT

As to the Class Action and Mootness:

57. Due to over a century of the lack of equal employemnt opportunity in this country for fellow Americans, Congress enacted in the public interest the Civil Rights Act of 1964 as additional legislation for enforcement of, among other things, the right not to be discriminated against in employment on the basis of race, color, religion, sex or national origin.

58. By EO 11246 and 11375, the President of the United States gave the Secretary of Labor responsibility for the administration of EEO among Government contractors and subcontractors and directed government contracting agencies, over 100, to cooperate with the Secretary and to comply with his rules, regulations, rulings and interpretations pursuant to the Order by him or his designee, the Director of OFCC.

59. Since the lack of EEO among federal contractors is against public interest the federal compliance agencies, about 15, designated by the Secretary are directed by the Order to comply with the Secretary's rules, regulations, rulings and interpretations pursuant to the Order for the enforcement of the EEO rights for and protection of the beneficiaries under the Order. In this case emphasis is on females and the highly visible minorities classified as blacks, yellows, reds and browns, i.e, Negroes, Orientals, American Indians and Spanish Surnamed Americans.

60. Defendant (No. 1) compliance agency, in the public interest, employed plaintiff and his colleagues,(EOS) Equal Opportunity Specialists(Employment) GS-13 for the purpose of protecting the EEO rights of the beneficiaries under the Order and to see that federal contractors and contractor-bidders are in compliance with their contractual obligation under the equal opportunity clause in section 202 of the Order for the benefit of the beneficiaries thereunder.

61. Instead of cooperating with the Secretary and complying with his rules, regulations, rulings and interpretations as directed by section 205 of the Order, defendants, without authority under 41 CFR 60-1.44, unlawfully, jointly and severally, interpreted 41 CFR 60-2.2(b) against the letter, spirit and intent of the Secretary and issued written instructions, October 14, 1971, to plaintiff and his colleagues directing them not to follow the guidelines of the Secretary to protect the EEO rights of the beneficiaries under the Order by seeing that contractors, contractor-bidders not in compliance with their equal opportunity clause are recommended as being in compliance so the contractor-bidder can be unlawfully awarded a contract.

62. It is therefore inequitable and unconscionable to think that defendants, jointly and severally can come before this Court with unclean hands after wilful, malicious and unlawful refusal to enforce the Order in the public interest to protect the EEO rights of the beneficiaries under the Order by directing plaintiff and his colleagues not to comply with the Secretary's rules, regulations, rulings and interpretations and now claim that this issue of their unlawfulness is moot because plaintiff in no longer in the agency.

63. Further, it is equally inequitable and unconscionable to think that defendnats jointly and severally can come before this Court and use its processes, plaintiff and his colleagues against the public interest to deny protection of the the EEO rights of the beneficiaries under the Order but plaintiff and his colleagues can not use the Court in the public interest to protect the EEO rights of the beneficiaries under the Order.

64. Additionally, it is inequitable and unconscionable to think defendants, jointly and severally, in their unlawful actions and abuse of administrative discretion with the help of the Courts can underrate and deevaluate the only EOS, plaintiff federal employee, lawfully enforcing the Order, according to defendants Nos. 6 and 7, by not following the unlawful direction and that for plaintiff to clear his federal employee permanent record, the issue is moot because plaintiff resigned rather than continue employment with irreparable damage to his career.

65. Clearly, the class action is in the public interest and the entire complaint to clear plaintiff's unlawful record as a federal employee, constructed by defendants, and to protect the EEO rights of the beneficiaries under the Order, is not moot. All allegations are judically cognizable claims for a review de novo under 5 USC 702, for defendants' unlawful actions jointly and serverally were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

As to Denial of Due Process and Equal Protection of the Laws:

66. To deny plaintiff review de novo under 5 USC 702 is in effect saying that federal employees must obey the unlawful oral or written directions of their supervisors at the risk of the employee's integrity, or suffer the consequences on his performance rating and appraisal by his unlawful supervisor without recourse to the Courts if he resigns under the unlawful conditions to protect his integrity and his federal employee permanent record.

67. No doubt such a principle in law or equity is untenable. Yet these are the irrefuitable facts.

68. In regard to blind obedience to authority such as the unlawful defendants, at the risk of ones integrity, life, liberty and property, out of fear, self-aggrandizement, economic duress or otherwise we need only recall the Nazi, Mai Lae, Attica and Watergate in modern times to see some consequences.

69. For Americans to direct Americans to deny Americans under the Order protection of their EEO rights is no less a disregard for the human worth of a fellow American than in the atrocities cited above because the method of economic strangulation to deny life, liberty and property is apparently innocuous.

70. Such unlawful, malicious and intentional wrongs can not be defended to perfect our Republic and our laws do not permit such unbridled travesties of justice to be sustained by its perpetrators who unlawfully use their administrative discretion to justify/their unlwful actions and cover-up without giving the aggrieved their day in Court.

71. Under all the circumstances, to deny plaintiffs their day in Court is a denial of due process and gives the unlawful defendants protection of the laws of Administrative Remedies while not giving equal protection to the lawful actions of the plaintiff under the same laws.

CONCLUSION AND RELIEF SOUGHT

72. It is inescapably clear that in the public interest defendants unlawful, 41 CFR 60-1.44, interpretation of 41 CFR 60-2.2(b), to deny protection of the EEO rights to the beneficiaries under the Order can not be sustained. Defendants usedtheir unlawful actions to construct an employee performance appraisal and rating record to underrate and deevaluate aplaintiff because he was the only EOS lawfully following the Order to protect the beneficiries there under. Defendants now declare that since plaintiff resigned the unlawful issues are not reviewable due to motness.

73. Further, defendants, to justify their unlawful actions through Administrative Remedies, ruled against plaintiff in all five of his grievances related to and against defendants unlawfulness and the Civil Service Commission upheld defendants in two grievances brought before it, on the basis that the agency actions were apparently lawful.

74. In addition defendants used its constructed rating and evaluations to deevaluate plaintiff for promotional opportunity, thus forcing plaintiff by construction toresign rather than to stay in the agency to be unlawfully terminated with the irreparable damage to plaintiff's federal career.

75. Wherefore plaintiffs pray for this Court to:

a. reverse the Court below as to dismissing the entire complaint on mootness;

b. reverse the Court below as to dismissing the class action;

c. amend the complaint to include the relation back amendment;

d. declare that defendants, jointly and severally, interpretation of 41 CFR60-2.2(b) was without authority under 41 CFR 60-1.44 and unlawful;

e. order in summary judgment that all related actions against plaintiff, i.e., the seven (7) grievances, by defendants after the unlawful interpretation are null and void and reversed in plaintiff's favor for the relief sought;

f. order defendants, jointly and severally, that hereafter 41 CFR 60-2.2(b) and (c) and all other rules, regulations, rulings and interpretations of the Secretary shall be the sole implementing authority of the Order by the agency and will be followed with the intent and spirit of the Order;

g. order defendants, jointly and serveally, to issue necessary directives throught the agency's eleven (11) Regions, with approval of the Director, rescinding all of its directives, memorandums, etc. not consistent with the Directors Memorandum 4900, November 10, 1971;

h. order defendants to cooperate with the Secretary and his designee as directed by section 205 of the Order;

i. award to representative organization(s) to be selected by plaintiff and possibly others to be selected by plaintiff and the Court nominal damages for each member of the classes of beneficiaries adversely affected by defendants unlawfulness under the Order, i.e., Negroes, Orientals, American Indians, Spanish Surnamed Americans and females- The Joint Reporting Committee, EEOC and OFCC can determine the number in each class;

j. award $100 000 to plaintiff for the unlawful wrongs by defendants against plaintiff;

k. award $1 000 000 to plaintiff for the malicious wrong with malice aforethought by defendants against plaintiff;

l. grant plaintiffs such other and further relief as may be deemed necessary and proper.

Respectfully submitted,

Le Roy Gillead

Le ROY F. GILLEAD
Appellant, Pro se, et al.